The letter of demand must strictly comply with the requirements of s 218(2)(a): *Re Willes Trading*[2] and J O'Donovan, *The Law of Company Liquidation* (3rd Ed) at p 48. See also *WT Henley's Telegraphic Works Co Ltd* v *Gorakhpur Electric Supply Co Ltd.*[3] In *Re Willes Trading*,[2] Needham J of the Supreme Court of New South Wales stated in his judgment that: 'The deeming effect of the notice ... arises only if the notice is in full compliance with the conditions set out in the section itself ...' Needham J was referring to s 222(2)(a) of the Companies Act which is identical to our s 218(2)(a). I respectfully agree with the view expressed by Needham J.

Accordingly, the demand must be made in writing and signed by the creditor or his authorized agent, and it must specify the sum due. The demand must be served at the registered office of the company. See J O'Donovan, *The Law of Company Liquidation*, pp 48 and 49. The normal practice is for the creditor to also state in the notice (1) that the company must pay the sum due within 21 days from the date of the service of the demand and (2) failing which the company will be deemed unable to pay its debt and action will be taken to wind up the company.

As already stated, the letter of demand relied upon by the petitioning creditor in the petition was the letter of demand dated 19 November 1985. First, it was a letter of demand sent to the company before the petitioning creditor instituted the civil suit on 20 November 1985. The amount stated in the letter of demand was disputed by the defendants at the O 14 stage. Secondly, the letter was not signed and it was not stated who the solicitors were who wrote the letter. Thirdly, the letter demanded 'immediate repayment'. This is contrary to s 218(2)(a) which provides that payment must be made within three weeks after the service of the letter of demand. Fourthly, the letter threatened to institute legal proceedings against the company and one Yap Kim Kee and not a winding-up proceeding. Fifthly, the amount demanded in the letter was $232,000 which was greater than the amount stated in the petition, that is $145,000 together with costs of $350. No statutory presumption of insolvency will arise from a failure to pay in response to a demand which was in excess of the amount stated in the petition. See J O'Donovan, *The Law of Company Liquidation.*

In the circumstances, the letter of demand dated 19 November 1985 was bad and the company cannot be presumed to be unable to pay its debts. Indeed the court will not be prepared to make a winding-up order based on unsatisfied statutory demand. See *Re Bryant Investment Co Ltd.*[5]

Since the petitioning creditor is unable to invoke the presumption under s 218(2)(a), the question is whether there is direct evidence to show that the company is unable to pay its debts or it is insolvent. I have examined all the affidavits and the documents exhibited thereto and I find that there is no such evidence.

For the reasons stated above, the petition is set aside. The costs of this application shall be costs in the cause. With regard to prayer (b), the company is in fact asking for a stay of the winding-up proceeding. This is stated in para 4 of the company's affidavit affirmed on 3 August 1988. Paragraph 4 states:

> I am also to state that in the alternative, this petition for winding up and all proceedings thereafter ought to be stayed in the interest of justice ...

Since the petition has been set aside, the question of stay of the winding-up proceeding does not arise.

Application allowed.

Solicitors: *Sukhdev Singh & Co*; *Shearn Delamore & Co.*

Reported by *Shaun Chan*

Rethina Development Sdn Bhd v Majlis Perbandaran Seberang Perai, Butterworth

HIGH COURT (PENANG) — ORIGINATING SUMMONS NO 31-446-88
MOHAMED DZAIDDIN J
4 NOVEMBER 1989

Administrative Law — Local authority — Housing scheme — Layout plan approved with conditions — Landscaping and tree planting required to be undertaken — Whether a valid condition — Condition for car park lots imposed — Whether conditions may be added to or amended after approval of layout plan — Whether monetary contribution may be levied following non-fulfilment of condition — Ultra vires — Local Government Act 1976 — Street, Drainage and Building Act 1974, ss 70 & 132 — Town and Country Planning Act 1976, ss 21 & 22

Local Government — Local authority — Housing scheme — Layout plan approved with conditions — Landscaping and tree planting required to be undertaken — Whether a valid condition — Condition for car park lots imposed — Whether conditions may be added to or amended after approval of layout plan — Whether monetary contribution may be levied following non-fulfilment of condition — Ultra vires — Local Government Act 1976 — Street, Drainage and Building Act 1974, ss 70 & 132 — Town and Country Planning Act 1976, ss 21 & 22

Words and Phrases — 'Any other matter' — Town and Country Planning Act 1976, s 21(3)

The applicant was the owner of a piece of land on which it had establised a housing scheme. The applicant brought an action against the respondent local authority and sought declarations that the tree planning and car park contributions paid by the applicant to the respondent were, inter alia, null and void and ultra vires the relevant legislation and that the applicant was entitled to the refund of the moneys paid as contributions.

The applicant had applied for and obtained planning permission for the scheme. The principal layout plan for the scheme was approved by the respondent subject to five conditions. There was no mention in the condition of the subject of landscaping and tree planting. However, the approved layout plan contained a statement with a signature underneath it to the effect that the applicant had fully understood that it must carry out landscaping work and tree planting according to the respondent's requirement and that it had agreed to pay a monetary contribution to the respondent at the rate fixed by the respondent.

In the layout plan, provision was made for a total of 154 car park lots for the scheme. The layout plan was approved by the council of the respondent subject to the five conditions, one of which was that the applicant was to provide sufficient car park lots in accordance with the standard requirement and the supervision of the council. Subsequently, when the applicant's architect submitted to the respondent building plans for the scheme, the respondent directed that an additional 111 car park lots be provided in the scheme so as to make a total of 265 lots. The applicant failed to provide the additional lots and the authority imposed a condition on the applicant requiring it to make a monetary contribution of $33,000 in lieu of the provision of the additional lots. The applicant paid the sum under protest.

It was contended for the applicant that there were no provisions in the Street, Drainage and Building Act 1974, the Local Government Act 1976 and the Town and Country Planning Act 1976 giving any local authority power to impose, demand or collect monetary contributions for landscaping and tree planting in housing schemes. It was also contended that the respondent had no power to impose an additional condition providing for the 111 car park lots after they had approved the principal layout plan under s 22 of the Town and Country Planning Act 1976.

Held, allowing the application:

(1) Any direction to a developer to carry out landscaping and planting of trees in a housing scheme does come within the meaning of any 'any other matter' in s 21(3) of the Town and Country Planning Act 1976 that the local planning authority considers necessary for purposes of planning.

(2) The undertaking by the applicant to carry out landscaping and tree planting was sufficient to bind the applicant to comply with the stated direction. However, there was no section in the relevant Acts of Parliament which empowered the respondent or, for that matter, any local authority, to impose a condition on the approved layout or building plan that an applicant submitting the plan must make a monetary contribution in lieu of fulfilling a specific condition imposed thereon. Therefore, the respondent had no power to impose and collect monetary contributions from the applicant for landscaping and tree planting in the said scheme.

(3) In view of the finding that the respondent had power to impose a condition for landscaping and tree planting in the said scheme, the applicant shall comply with the conditions required by the respondent as soon as possible.

(4) The respondent had no power to add, amend or go behind the conditions imposed in the layout plan once approval of the said plan was granted.

(5) When approval of the layout plan was given by the respondent, one of the stated conditions was that the developer was only required to provide sufficient car park lots in accordance with the council's standard requirement. The condition did not specifically state that 111 more car park lots must be provided. There could not be further directions to be made on the approved layout plan by the respondent while they were considering the approval of the building plan. In the result, the respondent were bound by their conditions as stated in the approved layout plan which was for the construction of a reasonable number of car park lots by the applicant, and subject to any specific figure stated in the condition, the provision of 154 car park lots was deemed to be reasonable in this case. It followed that any imposition of a monetary contribution in lieu of the physical construction of car park lots in the said scheme was also illegal and ultra vires.

[*Editorial Note*: The respondent has appealed to the Supreme Court vide Civil Appeal No 04-14 of 1989.]

Legislation referred to

Local Government Act 1976
Street, Drainage and Building Act 1974 ss 70, 132
Town and Country Planning Act 1976 ss 21, 22

E Mayandi (*G Rethinasamy* with him) for the applicant.
Abdul Aziz bin Ibrahim (*Anthonysamy s/o Selvanaikam* with him) for the respondent.

Cur Adv Vult

Mohamed Dzaiddin J: By this application the applicant, who is the registered proprietor of a piece of land known as lot 2978, mukim 12, Province Wellesley North, ('the said land') and owner of a housing scheme constructed on the said land known as Taman Tasik Rethina ('the said scheme') sought several declarations against the respondent ('MPSP') in connection with the late issuance of the Occupation Certificate of Fitness (OCF) for the said scheme. However, as the OCF had been issued while this application was pending before me, the applicant now prays for the following declarations:

(1) That the payment by the applicant to the respondent of the sum of $26,500 for tree planting contribution is ultra vires the Local Government Act 1976 and is null and void and/or alternatively the contribution of $100 per unit of flat is very harsh and unconscionable.
(2) That the car park contribution of $33,300 paid by the applicant to the respondent is also ultra vires all of the legislations governing the local government authorities, repugnant and obnoxious to the healthy growth of the housing industry.
(3) Consequently, an order that the applicant is entitled to the refund of $26,500 and $33,300 which was paid under protest to the respondent.

I shall now proceed to consider the two principal issues. First, I shall deal with the question of tree planting. What happened in this case was this. The applicant applied for and obtained planning permission to build 265 units of five-storey walk-up flats and 15 units of double-storey shop houses for the said scheme. The said principal layout plan was approved by the MPSP on 23 June 1984 subject to five conditions. The issue of landscaping and

tree planting was not included under the above conditions. However, the said approved layout plan contained a statement with a signature underneath it that the applicant had fully understood that he must carry out landscaping work and tree planting according to the MPSP's requirement, and that he had agreed to pay monetary contribution to the MPSP at the rate fixed by them. Further, there is also stated that 50% of the contribution must be settled before the applicant commenced construction work and the balance before the issuance of OCF. The MPSP had fixed the rate of contribution to be $100 per unit of dwelling house built. Therefore, in this case, the applicant was required to pay $26,500 as contribution, which he paid in two stages under protest.

Both Encik Mayandi and later on Encik Rethinasamy submitted that there are no provisions in the Street, Drainage and Building Act 1974, Local Government Act 1976 and Town and Country Planning Act 1976 giving the MPSP or for that matter any local authority power to impose, demand or collect monetary contributions for landscaping and tree planting in housing schemes. In fact, counsel stated that the MPSP were fully aware that this contribution has no force of law. The affidavit of Chew Ewe Guan, the respondent's Director of Engineering, affirmed on 15 July 1988 mentioned about a working paper prepared by the Assistant Director of Building, who stated that the MPSP were aware that at the moment there was no provision in law to enforce the guidelines in respect of monetary contributions for landscaping and tree planting. For ease of reference, I reproduce below the relevant paragraph from the said working paper:

> Satu tabung yang berasingan hendaklah diwujudkan untuk sumbangan kewangan yang dipungut itu dan hendaklah digunakan semata-mata untuk tujuan ini.
>
> Jawatankuasa ini sedar bahawa tidak ada peruntukan undang-undang dalam perundangan sekarang untuk menguatkuasakan garispanduan-garispanduan ini tetapi jawatankuasa ini juga sedar bahawa di Kuala Lumpur, Ipoh dan Johore Bahru, sumbangan-sumbangan yang serupa dikehendaki dibuat dan dipungut oleh pihakberkuasa-pihakberkuasa yang berkenaan. Demi mengadakan satu alam sekeliling yang lebih baik untuk pembayar-pembayar cukai kita, adalah dianggap bahawa garispanduan-garispanduan ini patutlah dilaksanakan oleh pihak majlis.

It was further submitted that the collection of this contribution by the MPSP had attracted the attention of the State Auditor, who in a letter to the Secretary of the MPSP dated 23 December 1985, queried about the contributions and opined that the respondent council were not empowered under s 132 of the Street, Drainage and Building Act 1974 ('the said Act') to collect any contributions. The auditor then requested the MPSP to refer the matter for the opinion of the State Legal Adviser, Penang.

In reply, Encik Abdul Aziz, counsel for the respondent, submitted that the MPSP has the power to impose and collect contributions from the applicant for landscaping and tree planting under s 70(3)(c) (which deals with conditions to be complied before the building plan is approved) and s 132(1) of the said Act. Counsel stated that by implication s 132(1) empowered the MPSP to collect any contribution to be used towards the beautification of the said scheme. Counsel also stressed that as the applicant had agreed to pay for landscaping and tree planting contribution at the planning stage, he was therefore estopped from raising this issue in this application. Further, the respondent relied on s 21(3)(g) of the Town and Country Planning Act 1976, which states that where the development involves the erection of a building, the local planning authority may give written directions to the applicant in respect of any other matter which the local planning authority considers necessary for purposes of planning. According to counsel, landscaping and tree planting were considered necessary by the respondent in granting planning permission to the applicant. Lastly, counsel submitted that if the MPSP could not legally collect contribution for the landscaping and tree planting, there was nothing to stop the MPSP from accepting voluntary contribution from developers as agreed between the MPSP and SPEAD Council comprising surveyors, planners, engineers, architects and developers.

It is trite that the applicant in this case is bound by the conditions imposed by the MPSP in the approved principal layout plan of the said scheme. Section 22(3) of the Town and Country Planning Act 1976 gives power to the local planning authority to impose conditions upon the granting of planning permission. However, as for the landscaping and tree planting condition, the applicant's director had acknowledged that she fully understood that the applicant must carry out landscaping and tree planting in the proposed scheme in accordance with the requirements of the MPSP. In addition, s 21(3) states:

> Where the development involves the erection of a building, the local planning authority may give written directions to the applicant in respect of any of the following matters, that is to say —
>
> (a) the level of the site of the building;
> (b) the line of frontage with neighbouring buildings;
> (c) the elevations of the building;
> (d) the class, design, and appearance of the building;
> (e) the setting back of the building to a building line;
> (f) access to the land on which the building is to be erected; and
> (g) any other matter that the local planning authority considers necessary for purpose of planning.

In my opinion, any direction to a developer for carrying out landscaping and planting of trees in a housing scheme does come within the meaning of 'any other matter' that the local planning authority considers necessary for purposes of planning. What more if it is the policy of the local planning authority to require developers to beautify their housing schemes. Thus, in the present case, the MPSP

granted the applicant planning permission based on the approved principal layout plan subject to conditions. The undertaking by the applicant to carry out landscaping and tree planting is sufficient to bind the applicant to comply with the stated direction. However, this is not the end of the matter. The crucial issue is: can the MPSP in law demand from the applicant payment of monetary contribution for landscaping and tree planting in lieu of the applicant having not physically carried out the work? It may be recalled that the applicant had in fact agreed to pay monetary contribution to MPSP instead of carrying out the landscaping work and tree planting. This is stated in the principal layout plan. Be that as it may, after studying the provisions of the relevant Acts of Parliament, I cannot find any section which empowers the MPSP and for that matter, any local authority, to impose a condition on the approved layout or building plan that the applicant of the plan must pay monetary contribution in lieu of fulfilling a specific condition imposed therein. The nearest I could find was s 132(1) of the Street, Drainage and Building Act 1974 which provides for the establishment of the 'Improvement Service Fund' into which shall be paid all moneys, including any contributions from any person towards the beautification, construction or laying out of any street, etc. 'Street' is defined in the same Act to include 'any road, square, passage, service road, whether a thoroughfare or not, over which the public have a right of way'. Incidentally, there was no evidence from the MPSP that they have even established this fund as required under the law.

No doubt, the MPSP could have agreed with the SPEAD Council that members of their association undertake to beautify the housing scheme by planting trees or carry out landscaping work. There is also evidence that the MPSP have drawn up guidelines for monetary contributions. However, quite unfortunately, this consensus between the MPSP and SPEAD and the guidelines have no force of law.

Therefore, taking this matter as a whole, in my judgment, the MPSP has no power to impose and collect monetary contribution from the applicant for landscaping and tree planting in the said scheme. In the result, I order the MPSP to refund to the applicant the sum of $26,500 with interest at 8% pa from the date of payment by the applicant to MPSP until realization. However, in view of my finding that MPSP has power to impose condition for landscaping and tree planting in the said scheme, I make a further order that the applicant shall comply with this condition as required by the MPSP as soon as possible.

Car Parks

On this issue of car parks, the following facts are not disputed. When the applicant's architect submitted five sets of the principal layout plan for approval by the MPSP, being the local planning authority, he made provision in the said plan for 154 car parks for the said scheme. This principal layout plan was approved by MPSP at a full council meeting on 23 June 1984 subject to five conditions, one of which was that the applicant was to provide sufficient car parks in accordance with the council's standard requirement and supervision. Accordingly, the architect proceeded to prepare a building plan which was submitted to the Building Department for approval. But, on 31 January 1985, it was sent back by the MPSP with a direction to the applicant to provide additional 111 car parks making a total of 265 spaces which was made on the basis of one car park for every flat. From the above facts, it is clear that the condition to provide the additional 111 car parks was imposed by MPSP after the principal layout plan of the said scheme was approved on 23 June 1984 and before the council deliberated on the question of the building plan.

On 7 February 1985, the applicant's architect resubmitted the building plan and confirmed by letter that the applicant had complied with this additional condition. On the same day, the applicant's developer also wrote to the MPSP requesting them to expedite the approval of the building plan. When approval was given, the applicant commenced construction and after completion there was a delay concerning the issuance of OCF for this scheme. Finally, the OCF for the said scheme was issued on 14 December 1988, not without problem, of course. It seems that on 3 November 1988, the applicant appealed for reduction of car parks from 265 spaces to 176. There was no reply until 14 December 1988 when the Director of Building informed the applicant by letter that MPSP would issue the OCF on condition the applicant paid to MPSP monetary contribution in lieu of the construction of 111 additional car parks which the applicant had failed to provide in the said scheme. The letter further mentioned that the applicant's appeal dated 3 November 1988 had been rejected. In such circumstances, the applicant was asked to pay the sum of $33,300, which he had paid at a later date under protest.

Therefore, the question to be determined here is whether the MPSP has the power to impose additional condition providing for all car parks after they had approved the principal layout plan under s 22 of the Town and Country Planning Act 1976.

Based on the above facts, in my judgment, the MPSP has no power to add, amend or go behind the conditions imposed in the layout plan once approval of the said plan was granted. My reasons are as follows. Clearly there are two separate Acts of Parliament which govern matters concerning the applicant's case. First, the Town and Country Planning Act 1976 ('the first Act') which deals with planning permission and secondly, the Street, Drainage and Building Act 1974 ('the second Act') which under

Part V deals with building plans application. Basically, all applications for planning permission for development must be considered under the first Act since development includes the carrying out of any building operation. Such application shall therefore be made to the local planning authority, in this case the MPSP. Now, under s 21(3) of the first Act, once an application for planning permission is submitted the planning authority is empowered to give written directions to the applicant matters provided therein, eg the level of the site of the building, elevation of the building, the class, design and appearance of the building and any other matter that the local planning authority considers necessary for purposes of planning. Under sub-s 4 the applicant shall them amend the plan submitted accordingly, and resubmit the said plan. The local planning authority shall decide on the application as soon as possible. It is important to stress here that s 22(3) says that after taking into consideration the matters specified in sub-s (2), the local planning authority may grant planning permission either absolutely or subject to such conditions as it thinks fit to impose or refuse to grant planning permission. Thus, applying the above provisions of the law to the present case, it is abundantly clear that after the applicant had submitted the principal layout plan, the full council of MPSP considered it and granted planning permission subject to five conditions, one of which was that the applicant was to provide sufficient car parks in accordance with the council's standard requirements and supervision. It is material to the applicant's case that I should reproduce the said condition hereunder:

> Diluluskah dengan syarat
> (4) Tempat letak kereta hendaklah disediakan dengan sacukupnya mengikut kepertaraan majlis dan diserahkan kepada majlis untuk penyelenggaraan.
> (5) ...

It can be seen from the approved principal layout plan that the applicant's architect had earlier made provision for 154 car parks, but when approval of the said plan was given by the MPSP, one of the stated conditions was that the developer was only required to provide sufficient car parks in accordance with the council's standard requirement. The condition above did not specifically state that 111 more car parks must be provided. It is patently clear to me that the issue of the applicant having to provide the additional 111 car parks only come into picture at the time when the applicant's architect submitted building plans in respect of the said scheme for the approval of the MPSP. However, for building plans, the council's powers come under s 70(3) of the second Act. In simple language, this section says that no person shall erect any building without the prior written permission of the local authority and any person who intends to erect any building shall submit to the local authority such plans and specifications as may be required by the law. And sub-s (3) says that no plan for the erection of the building shall be approved, until conditions (a), (b) and (c), which are before any other conditions which the local authority may deem necessary to impose, have been complied with. Thus, from the facts it is plain that the imposition of 111 additional car parks was made by the council at the time when the MPSP were considering the building plan. Therefore, when the Secretary returned the said building plan together with five sets of the approved principal layout plan to the architect for necessary amendments, the instruction cannot be for amendment of the said approved layout plan because when dealing with the provision of s 70 of the second Act, there cannot be further directions to be made on the approved layout plan by the MPSP while they were considering the approval of the building plan. In the result, I hold that the MPSP is bound by their conditions as stated in the approved principal layout plan, which is for the construction of reasonable car parks by the applicant and subject to any specific figure stated in the conditions, 154 car parks is deemed to be reasonable in this case.

It follows from the above that any imposition of monetary contribution in lieu of physical construction of car parks in the said scheme is also illegal and ultra vires. Accordingly, I make an order that the respondent shall refund the sum of $33,300 to the plaintiff with interest at 8% pa from date of payment by the applicant to MPSP until realization. Lastly, I grant costs of the application to the applicant to be taxed by the proper officer of the court.

Application allowed.

Solicitors: *Mayandi & Panjaram; Rethina & Co; Aziz, Anthony & Co.*

Reported by *PS Ranjan*